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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 121.

DOROTHY K. KNOST, *Petitioner,*

v.

DONALD A. MACMILLAN, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The memorandum opinion of the Justice of the United States District Court for the District of Columbia denying the motion for judgment *non obstante veredicto*, or for a new trial, is not officially reported but appears in the record at page 516. The opinion of the United States Court of Appeals for the District of Columbia (R. 527-529) is reported in 126 F. (2d) 235.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 9, 1942 (R. 530). The petition for rehearing was denied on March 30, 1942 (R. 538). The petition for certiorari was filed on June 5, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

The decedent made a will, giving all, where theretofore she had given only half of her estate, to her husband's nephew. This will, unlike her prior wills, was not drawn by her Washington lawyer. She had an older brother of the beneficiary in California help her write it, modeling it after his will. She was well, traveling about alone, and admittedly of sound and disposing mind. A niece, from whom she had been estranged for a year before her death, but who had been a beneficiary in the earlier will, charged that the last will was obtained by undue influence, basing the charge on an innuendo of improper infatuation of the 76 year old woman for her 41 year old nephew. The jury sustained the charge. The trial court denied a motion for a directed verdict, and denied a motion for a verdict *non obstante veredicto* or, in the alternative, a new trial, and entered an order refusing probate of the will.

On appeal, the United States Court of Appeals for the District of Columbia, in a two to one decision, reversed the trial court, on the ground that there was no legal evidence of undue influence. Petitioner's motion for a rehearing before all six of the judges of the United States Court of Appeals for the District of Columbia was denied.

The only questions presented are (a) whether it usurps the functions of a jury for two judges, out of three sitting, to reverse the trial court in denying a motion *non obstante veredicto*, and (b) whether it was an abuse of discretion to deny petitioner's request for a rehearing before all the judges of the United States Court of Appeals for the District of Columbia.

STATUTES AND OTHER MATERIAL INVOLVED.

Title 19, Chapter 3, Sections 301, 305, 307, 311 and 312 of the District of Columbia Code (1940 Edition) relating to the Probate of Wills, are set out in the Appendix.

Pertinent portions of the Organic Act, the Act of Feb. 9, 1893, c. 74, 27 Stat. 434, Secs. 1 and 6, creating the Court of Appeals for the District of Columbia and also Title 11, Chapter 2, Secs. 201 and 205, District of Columbia Code (1940 Edition), each relating to a "full court" are also in the Appendix to this brief.

For the convenience of comparison with the provisions of the Code of the District of Columbia, Judicial Code Sections 117 and 120 are printed in the Appendix.

STATEMENT.

The purpose of this petition is to have this Court review the record of a will contest in the District of Columbia, where petitioner charged that her aunt's last will was obtained by undue influence.

The testamentary capacity of deceased and her physical vigor at the time of making the will are all admitted.

Mrs. Nellie E. Cameron, the deceased, a widow residing in Washington (R. 1), was "a very lovable and sincere old lady" and "very straightforward" (R.

239). A Washington lawyer, Walter Guy, had probated her husband's estate, from which she received what money she had. He also drew her prior will, in which she divided her estate practically equally between her niece, Dorothy Knost, petitioner herein, and her husband's nephew, Donald MacMillan, respondent (R. 83-85).

During Mrs. Cameron's later years, after she was 70, living alone in Washington, the petitioner, living in Ohio, never visited, seldom wrote, and never phoned or wired her aunt. She acknowledged the existence, during these years, of a growing estrangement from her aunt (R. 159-160).

In 1937, about a year before Mrs. Cameron's death, petitioner sent deceased a formal, unloving letter (Caveator's exhibit 12) refusing a simple request the old lady had made for the return of a keepsake (R. 136-137). This letter grieved deceased deeply. She spoke often to strangers about it saying (R. 449) that she was "ashamed" of her own relatives. She carried it around in her purse, where it was found at her death (R. 325).

Meantime, the MacMillan family, including all of respondent's brothers and sisters, at various times from 1933 to 1937, visited Mrs. Cameron in Washington. Dan came up from the University of Alabama (R. 309); the doctor, Douglas, whom later Mrs. Cameron asked to help her write the challenged will, stopped enroute to Europe, where in 1933 he went to do postgraduate work in medicine (R. 331); and the girls, two of them nurses, and one the family housekeeper, stopped enroute to New York (R. 311, 377). Donald (respondent) took her out almost daily whenever he came in his car to the Washington office of the New York Life Insurance Co., for which company he

worked. As early as 1934, deceased expressed appreciation for this attention saying, (R. 331, Caveatee's Exhibit 41)

> "You can't imagine how much I miss you, Donald. I appreciated your calling me almost every evening—then the nice auto drives we had. I looked forward to the phone calls—nice to have someone take that much interest in an old lady".

For two years before her death Mrs. Cameron referred to the MacMillan family as "my boys and girls" (R. 249, 263, 279, 299, 377, 391, 395). Donald was her favorite. He, as a boy, in response to his uncle's request (R. 306), had come from Canada, spending the summer of 1919 with his aunt and uncle in Washington. Always thereafter deceased had written him frequently and lovingly, signing her letters "Aunt Nellie" and writing for both herself and her husband, giving Donald motherly advice on business and on his marriage and divorce (R. 325-399).

Another bond between respondent and deceased was her solicitude and affection for two bedridden cousins of hers, who lived in Long Beach, California. Over many years Donald MacMillan and his sisters visited these invalids, and for this kindness the deceased expressed repeated gratitude (R. 312, R. 325-399).

Respondent drove deceased to California in 1936, where she visited the cousins in Long Beach and lived for the winter season at the Hershey-Arms Hotel (R. 310, R. 243-247).

During the time from 1936 to 1938, except for a birthday and a Christmas card (R. 148), Mrs. Knost never gave her aunt any attention, her very last (R. 148) communication being the cold, unloving letter (Caveator's Exhibit 12) which grieved deceased so much.

In the spring of 1937, respondent drove Mrs. Cameron back to Washington. While alone in Washington, when no MacMillans were visiting her, and none was even near, she sent back Mrs. Knost's framed photograph, writing that she was "through with it". (R. 390, 392.)

Speaking then of petitioner, deceased said, "I can't understand how a woman can play such beautiful music and be so cruel at heart" (R. 264). Mrs. Knost never wrote, wired or phoned, or made any effort to renew affectionate relations, although she admitted receiving the framed photograph, and a letter from her aunt saying that she was "through with it". (R. 149.)

In the fall of 1937, respondent again drove deceased to California (R. 266). She was overjoyed to be back (R. 446) and shortly thereafter went to Dr. MacMillan's office to have him help her make a will with Donald the sole beneficiary (R. 23, 24, 30). They modeled it after the Doctor's will, and Mrs. Cameron carried it away in her purse (R. 31).

At the time of making this last will, and for three months thereafter, Mrs. Cameron was living at the Hershey-Arms Hotel in Los Angeles, under no restraint or surveillance from anyone, paying her own bills, going about as she pleased, and writing frequently to her friends (R. 249).

A month after making the will she gave a family party (R. 464-5), just for the MacMillans, and after a particularly happy time (R. 273, 299, 447), she presented the will to Donald (R. 300), saying it was "small appreciation on my part for the pleasures you have made for me * * *".

For two months after making the will deceased was in communication with her lawyer in Washington. In letters to him she spoke of her happiness, but she ex-

pressed no word of dissatisfaction with the will she, with Dr. MacMillan's help, had drawn (R. 95-6).

None of the above facts is refuted in any way in the record.

In the light of such facts—disinheriting a niece whom deceased had not seen for three years, from whom she had received a cold letter that hurt and to whom she had returned a portrait with the comment that she was "through"—in favor of her husband's nephew, who, with his brothers and sisters, had loved her, been "family" to her and had made her last years happy and interesting, is a natural, normal act.

Furthermore, the innuendo of improper "infatuation" between the "73 year old deceased and 37 year old respondent", which confused and mislead the jury, which was persisted in before the Court of Appeals, and which is even suggested to this Court, is repulsive in the light of the undisputed facts.

ARGUMENT.

The United States Court of Appeals for the District of Columbia, in reversing the District Court, has not usurped the functions of the jury. The petitioner had every right of a jury trial. But—in availing herself of the right to try these issues by a jury she cannot sidestep control of the jury by the court, nor avoid the result of the judge passing upon a motion for a directed verdict, or the motion *non obstante veredicto,* each of which test the sufficiency of the evidence, ~~and~~ which is the sole responsibility of the court. Nor has she any legal grounds for the complaint that she has been deprived of a jury trial, through the Court of Appeals reversing the trial court on such motions. In doing so, the Court of Appeals reviewed only the functions of the trial judge—*not* the functions of the jury. *Baltimore*

and C. Line v. *Redman,* 295 U. S. 654, 79 L. Ed. 1636; *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 81 L. Ed. 1177.

Berry v. *United States,* 312 U. S. 450, 85 L. Ed. 945; *Conway* v. *O'Brien,* 312 U. S. 492, 85 L. Ed. 969; *Halliday* v. *United States,* Law Ed. Adv. Op. Vol. 86, p. 393, are not controlling here. In the *Conway* (footnote No. 3, p. 493) and *Berry* (p. 451) and the *Halliday* (p. 394) cases, although in each instance, the defendant moved for a directed verdict, he failed, in each case, to move for a judgment *non obstante veredicto* within the ten days provided in Rule 50 (b).

In the instant case there are two circumstances which distinguish it from cases on which petitioner relies,—first, the judgment of reversal of the Court of Appeals rests upon a review of the denial of the motion *non obstante veredicto,* which made it a review of the functions of the court, and not a review of the functions of a jury, and, second, the case is based on statutes limited to the District of Columbia, not those of general jurisdiction.

Nor is there any merit in petitioner's statement that "there is no statutory authority for the decision of any case by the Appellate Court below by less than a full court", when that statement is coupled with her argument that the words "full court" in the statute mean all the judges.

In *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue,* L. Ed. Advance Opinions Vol. 86, p. 242, a rule of common sense is offered as the proper way to measure the meaning of such a statute:

> "* * * the conclusion that § 117 provides merely the permissible complement of judges for a Circuit Court of Appeals results in greater harmony in the statutory scheme than if the language of § 117 is taken too literally. And any sacrifice

of literalness for common sense does no violence to the history of § 117."

It is true that there is a slight variation in the lan-uage of the Acts creating and governing the United tates Court of Appeals for the District of Columbia rom those relating to other Circuit Courts of Appeals, ut the expression "a full court" is found in both. (cf. udicial Code, Section 120 and Sec. 205, Title 11 of the ode of the District of Columbia set out in the Appen-ix.) The words "full court", as used in each Act, efer to a court of three judges as originally constituted. o interpret it so that every judge on the court would ave to sit in every case, would defeat the legislative urpose of enlarging the number of judges above three, hich was to dispose of larger dockets.

Likewise, petitioner's argument that it was arbitrary ot to grant a rehearing by *all* of the judges when peti-oner demanded it, offends the rule of common sense, ecause if petitioner were right, it would mean that very defeated litigant could, at will, requisition the me of every member of the court to review a decision ith which he was dissatisfied.

The Court of Appeals correctly applied *Gunning* v. *oley*, 281 U. S. 90; 74 L. Ed. 720. Petitioner misuses in her effort to invoke this Court's jurisdiction and sert a conflict of decisions. In that case this Court arified confused views of the justices of the Court of ppeals of the District of Columbia on when a motion r a directed verdict must be denied. This Court com-ented (p. 95) that the opinion seemed to rest "upon e conception that the rule stated by the Chief Justice quired denial of defendant's motion if plaintiff's ims were supported by *any* evidence, however ght". Pointing out that "that is not the rule applied Federal courts",—the correct rule was stated that—

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed' ".

In the instant case the Court of Appeals for the District of Columbia reviewed the "preliminary question" which was before the trial judge and, applying the above rule, decided that innuendo and inferences which had confused the jury did not constitute evidence "upon which the jury could properly proceed to find a verdict" of undue influence.

Certiorari should be denied because the decision below is based upon a statute confined in its operation to the District of Columbia, namely, the law providing for the admission of a will to probate in the District of Columbia, caveat thereon, and the trial of issues raised by caveat. Consequently the case does not fall within Rule 38. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285; 80 L. Ed. 229.

CONCLUSION.

There is no conflict with any decision of this Court, or any other court, and no important point of Federal law is involved. As the Court of Appeals said in its opinion (R. 527-529) "There is no evidence that the will was not in accordance with her (Mrs. Cameron's) wishes when, and after, she made it", and there is "no evidence of oppression or coercion" and "no evidence of improper conduct, as we interpret that term". "Moreover possibility or suspicion of undue influence

is not enough," citing *Beyer* v. *LeFevre,* 186 U. S. 114, 126; *Brooke* v. *Barnes,* 61 App. D. C. 161, 58 F. (2d) 887.

The petition for certiorari should be denied.

Respectfully submitted,

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